

**EXECUTIVE POLICIES FORMULATION OF COERCIVE EFFORTS  
USAGE AS POLICE DISCRETION AT THE ARRESTING STAGE OF  
TERRORISM CRIMINAL SUSPECTS**

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# **EXECUTIVE POLICIES FORMULATION OF COERCIVE EFFORTS USAGE AS POLICE DISCRETION AT THE ARRESTING STAGE OF TERRORISM CRIMINAL SUSPECTS**

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## **ABSTRACT**

The arresting action that is done to the suspect of terrorism determined by the understanding about the prevailing law and morality and SOP (Standard Operational Procedure) that has been determined to enforce justice. The given authority should not oppose with Human Rights, to determine the abuse in the discretion at the arrest stage by using whether the authority usage deviates from the authority giver and whether the abuse of power has occurred or not, then the parameters that can be used are rationality principles.

As the guidance or foundation for Indonesian Police member to do the police discretion suitable with the main tasks and authorities that contained Article 18 subsection (1) and (2) of Law No 2 Year 2002, that is: (1) For public interest, Indonesian Republic in conducting their tasks and authorities can act according to their own assessments. (2) The stipulation implementation as given in the subsection (1) only can be done in the very urgent condition by considering legislation and profesional ethics code of Indonesian Police.

Some articles in the Perkap No 1 and 8 Year 2009 still can be categorized as multi interpretation and not measured clearly where the implementation in field able to produce abuse of power. Especially for the term usage of suspect stop contained at the Perkap. The term of stop according to the Indonesian big dictionary means to stop, to finish, to make (cause) stop (stop means not move). In the law enforcement practice relates with the terrorism arrest has occurred abuse of authorities if not based on rationality and the understanding and implementation of true legal norms that will influence the law enforcement that can not be answered in moral and accountable.

Effort to eradicate the terrorism criminal offense should be followed by executive policy formulation as the clear, firm and measured Fixed Procedure so each power usage in the police action especially firearms can be answered based on human rights, Code of Conduct for Law Enforcement Officials and Basic Principle on the Use of Force and Firearms by Law Enforcement Officials, by omitting the use of stop term in the usage of firearms and replaced by immobilize and give clear variable about the term of life safety threats (open norms should be avoided to avoid the multi interpretation) , should implement Lex Certaf principle, the formulation should be certain, concise.

**Keywords: policy formulation, coercive efforts, discretion**

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## INTRODUCTION

Terrorism is extraordinary crime, because the produced consequences of the crime is extraordinary, such as death and hard injury in mass and random, material damage or produce extraordinary environmental damage and decrease the socio-economic quality of society and threat the human security. The special characteristic of the terrorism in Indonesia especially, that terrorism is transnational crime and organized crime, transnational crime is cross border crime that collaborate and contribute each other among the crime doers in domestic and foreign organizations.

Look at the scope and impact and the modus operandi that exceed the conventional crimes, than the terrorism crime called as the extraordinary crime. Terrorism also called as hostes humanis generic, the enemy of human being<sup>2</sup>, so need extraordinary steps to reveal and prevent the crime<sup>3</sup>. Terrorism actions in Indonesia as extraordinary crime, because the doers often do their action in the form of bombings to societal center of activities, attack to citizens and security officials by using weapons of massive destructions. About 154 cases from 198 cases of bombing to several cities in Indonesia can be revealed by Indonesian Police during 1999-2001. Some prominence bombings such as in Bali,

Makasar, Poso, Ambon, Medan, Jakarta and in April 2011 there was suicide bombing with target of security apparatus facilities exactly at the Majid Al Zikra of Cirebon City Police that caused more than 20 polices injured. The bombings that were done by terrorism groups can be revealed by Densus 88 of Indonesian Police Anti Terror by arrest the doers either in life or dead.

Special Detachment 88 of Indonesian Police Anti Terror as Special Unit that handle the terrorism case in Indonesia under control of Detective and Criminal Agency Head of Indonesian Republic conduct hunting, revealing, and arresting the suspects of terrorism in Indonesia and cooperate with the National Terrorism Prevention Agency (BNPT) to do de-radicalism to the arrested terror doers and radical group of society. The unit has special abilities to face or overcome the terror doers that have abilities for: urban war, bombs assembling, and shoot with various guns, self defense, survival in nature and ability to use computer and information.

Based on Geneva Convention for Prevention and Punishment of Terrorism in 1937, the terrorist action as "criminal acts directed against of particular persons or group of persons or general public". Although the definition is not prevail, but the elements in the definition are useful investigation materials, especially for states that are formulating the terrorism definition in the laws and regulation<sup>4</sup>.

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<sup>2</sup> Muladi, *Undang-undang Pemberantasan Tindak Pidana Terorisme dalam Kerangka Hak Asasi Manusia*, makalah disampaikan pada Kuliah Umum S1 Fakultas Hukum Universitas Diponegoro, Semarang 2003

<sup>3</sup> Ali Masyhar, *Gaya Indonesia Menghadang Terorisme; Sebuah Kritik Atas Kebijakan Hukum Pidana terhadap Tindak Pidana Terorisme di Indonesia*, (Bandung: Mandar Maju, 2009), hlm. 6.

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<sup>4</sup> M. Arief Amrullah, *Money Laundering Tindak Pidana Pencucian Uang, (Reorientasi Kebijakan*

Related with the extraordinary terrorism crime, then to take actions against and arrest the doers should be overcome with extraordinary measures and the officers should have special abilities. In eradicating the terrorism needs professional and dependable human resources in their field and well trained. Facing the trained and experienced terror doers, Indonesian Police form special unit called as Special Detachment 88 of Indonesian Police Anti Terror. Where the member come from experienced detectives and have good competences and selected as examiners and investigators and accompanied with the well trained and high discipline responding team as the CRT (Crisis Response Team) that are recruited from Mobile Brigade and Gegana Team with expertise qualification to domesticate bombs or other explosive materials. The team has duty to hunt, encircle, seize, and arrest the doers and domesticate the bombs or explosive materials that are found at the location or the hiding place of the doers.

As the guidance or legal foundation for the Indonesian Police to do the police discretion suitable with the main tasks and authorities that contained in the article 18 sub section (1) and (2) of Law No 2 Year 2002, that is:

- (1) For public interest, Indonesian Republic in conducting their tasks and authorities can act according to their own assessments.

- (2) The stipulation implementation as given in the subsection (1) only can be done in the very urgent condition by considering legislation and professional ethics code of Indonesian Police

Then in the article 19 of Law No 2 Year 2002, have authorities as follows:

- (1) In conducting tasks and authorities, the Indonesian Police officials should act based on legal norms and considering the religious, politeness, ethics and uphold the human rights.
- (2) In conducting tasks and authorities as mentioned in the subsection (1), the Indonesian Republic prioritizes the preventive actions.

Relates with main tasks and discretion authorities given by law to the Indonesian Police, in this case to do examination and investigation to the terrorism suspects that regulated in the Law NO 15 of 2005 about the Determination of Governmental Regulation of Law Substitute No 15 Year 2002 about the Terrorism Crime Eradication become law.

The use of coercive efforts as the discretion forms at the arresting stage to the suspect, there are two approach that can be done by the investigators based on their own assessment, that is logical situational consideration and legitimacy in the form of soft power action and hard power actions such as usage of firearms to stop the

terrorism doers<sup>5</sup>. Of course the discretion actions based on their own assessment or other do actions that can be answered legally still refer to Criminal Codes, Law No 2 Year 2002, about Indonesian Republic Police and also executive policy formulation as the internal regulation that is issued by Indonesian Police in the form of Regulation of Indonesian Police Head (Perkap) No 1 Year 2009 about Procedures of Force Usage in the policing actions.

Some articles in the Perkap No 1 Year 2009 still can be categorized as multi interpretations and not measured clearly where the implementation in the field able to produce abuse of power. Especially the term of stop the suspect in the article 1 number 5, article 5 subsection (1) letter f, article 7 subsection (1), article 8 subsection (2) and (3) means that the use of force can be done if needed and can not be avoided based on the faced situation to stop the suspect action. The term to stop also exist at the Perkap No 8 Year 2009 about Implementation of Principle and Standard of Human Rights in the Implementation of Indonesian Police Tasks, especially in the article 47 subsection (2) letter e. The term of to stop according to the Indonesian Big Dictionary mean to finish, to complete, to make (cause) stop (stop mean not move condition).<sup>6</sup> The tern to stop exist at the Perkap can be interpreted by the

Police officers during the usage of firearms to face the situation that is considered as threatening the officer safety or around society then the officers able to shoot theirs firearm to the suspect to stop them.

The discretion action that is formulated in the Perkap or give priority to the subjective interpretation of the police apparatus in implementing the article of firearms usage to stop the doers because of the urgent situation for public interest and the officers safety. The too general interpretation cause multi interpretation that ended with abuse of power. The use of coercive efforts at the arresting stage as the form of discretion is expected by the human right observers and Legal Aid Body as too relax, because the procedural mechanisms in the law and regulation of terrorism eradication and police regulation do not regulate in detail, clear, and firm so give opportunities for repressive action by the apparatus. Beside Perkap No. 1 Year 2009, also exist Perkap No 8 Year 2008 about the Implementation of Principle and Standard of Human Right in the Implementation of Indonesian Police Tasks that regulate the usage of power or hard action and fire arm usage. At the articles there is no explanation that the officer should do maximum effort to paralyze the doers or suspects before final effort of firearms usage is done. So the officers able to use firearms to stop the suspect actions that are considered as threatening the officers and society, and the

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<sup>5</sup> Interview results with unit members of Investigation and Crisis Response Team (Responding Team) of Special Detachment 88 of Indonesian Police Anti Terror

<sup>6</sup> Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, edisi ketiga, (Jakarta: Balai Pustaka, 2002) hlm. 396.

urgent situation or possibly for the suspect to escape.

The executive policy formulation by using coercive efforts at the arresting stage of the suspect is operated and regulated in the Perkap that regulates the usage of firearm by police officers during arresting the suspects that are considered as have done criminal action is Perkap No 1 Year 2008 about The Usage of Force in the Police Action and Perkap No 8 Year 2009 about Implementation of Principle and Standard of Human Rights in the Implementation of Police Task in Indonesian Republic.

## RESEARCH METHOD

The research in this writing was legal research related with the academic activities. Black Law Dictionary give definition about legal research as:

- (1) The finding and assembling of authorities that bear on a question of law
- (2) The field of concerned with the effective marshalling of authorities that bear on a question of law<sup>7</sup>

The research direct to analysis of fixed procedures that used by Indonesian Police during the usage of coercive efforts as the form of discretion and considerations that influence the action based on their own assessment as discretion. Called as the legal research in the academic activities, means to differentiate the legal research in relation with the practical legal research as written by Peter Mahmud Marzuuki, that legal research

is a process to find legal regulation, legal principles, legal doctrines to answers the facing legal issues<sup>8</sup>. Academic legal research relates with the effort to give useful contribution for the jurisprudence development through the finding of new theories, or finding new argumentations, or finding new concept to the things that are considered as settle in the jurisprudence<sup>9</sup>. The legal research was done by suitable method with special character of jurisprudence that different with social science or natural science<sup>10</sup>. The research results were aimed at giving recommendations to law enforcers in taking discretionary decision based on their own assessment, then the research included in the Law Reform Research<sup>11</sup>. The research type is normative juridical research, or doctrinal legal research, where the law is conceptualized as legal principle that written or not either in national criminal code, international criminal code, or in other countries criminal code such as (United State, Britain, Australia, Singapore, and Philippine). The research included legal principles, legal norms especially legal substances as the problem formulation either according to the national criminal code,

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<sup>8</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Prenada Media, 2005), hlm. 35.

<sup>9</sup> Tim Penyusun, *Pedoman Pendidikan Program Doktor* 1998/1999, (Surabaya: Program Pascasarjana Universitas Airlangga, 1998), hlm. 19

<sup>10</sup> J.J.H. Bruggink, *Rechtsreflecties*, alih bahasa Arief Sidharta, *Refleksi Ilmu Hukum*, (Bandung: Citra Aditya Bakti, 1995), hlm. 213-218, Lihat juga Philipus Mandiri Hadjon dan Tatiek Sri Djatmiati, *Argumentasi Hukum*, (Yogyakarta: Gajah Mada University Press, 2005, hlm. 1-5.

<sup>11</sup> Terry Hutchinson, *Researching and Writing in Law*, (Sydney: Lawbook, 2002), hlm. 57.

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<sup>7</sup> Bryan A. Garner, *Black Law Dictionary*, Seventh Edition (Minn: ST Paul, 1999) page. 907

international criminal code, or criminal law in other countries<sup>12</sup>.

## **RESEARCH RESULTS AND DISCUSSION**

### **1. Executive Policy Formulation of coercive effort usage as discretion form of police at arresting stage of terrorism criminal suspect.**

#### **a. Brief History of Terrorism In Indonesia**

Radicalism problem in Indonesia has been exist at least since about eighty years ago. Look again at the history, radicalism in Islam has rooted for long time in the Indonesian communities, even in the pre independence time. At that time the radical Islamic community often oppose with other groups to struggle the independence, even they different in vision with the nationalist. Even, at that time Indonesian nation was uniting all national elements and try to remove the ethnical, religious, racial, and class screens to fight for independence. It can be traced from the writing of Bung Karno that recall, in any country where Moslem present, should serve and bring welfare for the around communities. The true Islamic attitude will produce strong nationalism. The religious background movement that damaged the unity of Indonesian Republic such as:

- (1) Darul Islam/Indonesian Islamic Army in West Java, the rebellion of Darul Islam/Indonesian Islamic Army under

Kartosuwiryo become the departure point in analyzing the terrorism movement with religious motive in Indonesia. DI/TII emerged five years after Indonesia proclaimed its dependency. DI/TII was formed to embody the Kartosuwiryo idea in effort to enforce Islamic syariat formally and established Indonesian Islamic State (NII). The idea still sticks as the main goals in the terrorism doer today. Because of that, although DI/TII of Kartosuwiryo did not included in the terrorist organization, it should be spotlighted.

- (2) Darul Islam/ Indonesian Islamic Army at South Sulawesi, at South Sulawesi, DI/TII was headed by Abdul Kahar Muzakar. He was born at Lanipa village, near Palopo, march 24 of 1921. Kahar Muzakar come from noble family, his father was wealthy farmer. During his adolescence, Karha Muzakar was called as Domeng. About seventeen years old, Kahar Muzakar was sent to Surakarta to study at Muhammadiyah school. Kahar Muzakar was involved in DI/TII on January 20 1952. Kahar Muzakar accepted the Kartosuwiryo offer to be the TII Commander of Division IV of Sulawesi Region. The division then be called as Hasanudin Division. At that time, beside expressed his pride because has been believed as the Division IV Commander, Kahar Muzakar then stated he is pessimistic to dedicate fully. The

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<sup>12</sup> Soetandyo Wignjosoebroto, *Hukum; Paradigma, Metode dan Dinamika Masalahnya*, (Jakarta: ELSAM dan Huma, 2002), hlm, 147-160.

reason was, many condition that will inhibit him as the commander. Although he has been appointed as the commander of TII, but for a while he did want to use TII names for his troops, he selected to use People Independence Army (TKR). On August 7 1953, Kahar Muzakar stated that Sulawesi and East Indonesian Area ready to merge with NII. Because he has been considered bring great contribution for NII, Kahar Muzakar then be appointed as the First Deputy of Defense Minister of NII. During his leadership at Sulawesi, he has done some actions, such as attack to Indonesian national Army (TNI), bridge destroy, kidnap of doctors and Christian priests. The Indonesian Government did not stay silent. The government did Destroy Operation and Lightening Operation to destroy the rebellion. Finally on February 2 1965, Kahar Muzakar was died shot at the operation.

- (3) Darul Islam/ Indonesian Islamic Army in Aceh, the DI/TII Aceh emerged in 1953. Daud Beureuh as the main figure that influenced dominantly to the Aceh DI/TII. Daud Beureuh stated that Aceh and around are part of NII region. DI/TII under Daud Beureuh succeeded to master mostly Aceh region, only big cities such as Banda Aceh (Kutaraja), Sigli, North Langsa, and Meulaboh, south areas still under Indonesian Republic. The Aceh rebellion to be NII because the Daud Beureuh disappointment to the

Soekarno government. The disappointment initiated when Soekarno did not fulfill his promise to implement Islamic syariat at Aceh after the independence war has finished. Below was the Soekarno promise about the Islamic syariat implementation at the Aceh area.

- (4) Independent Aceh Movement (GAM), the emerging problem not only about religion, but economic factors also become the trigger for the Aceh people to establish the GAM. The GAM establishment aimed at separating Aceh from Indonesia. According to the officials at the time, if conducted more control by Jakarta and Medan (Capital of North Sumatera), then the position of Aceh people will be weak. In October 1976, Teuku Muhammad Di Tiro or Hasan Tiro together with his supporters declared the independence of GAM. They widened their influence in Indonesian area, especially Aceh area and borders. Aceh people declared their independence aimed at forming their own government and improving all life aspects, either social, political, and economic aspects. The condition made the central government considered the GAM as separatist movement. Then, the policy in the form of attack was taken by government to prevent the widening of the GAM influence at Aceh area. Because the conflict between GAM and Indonesian Republic Government not



subside yet, it make Soeharto Government in 1990 imposed Military Operation Region at Aceh and ended in August 1998. During the Military Operation at aimed at overcoming the GAM, it is filled with violent actions, and caused many deaths . the rebellion that is faced with gun trigger more disappointment and anger of Aceh people. The despotic treatments that were received by Aceh people was assessed as adding their hardship. Based on the Presidential Advisor Team for Aceh, the died victims during the DOM implementation reached 1.300 persons, while the lost victims or not found victims about 1.968 persons.

- (5) Al-Ajamaah Al Islamiah, the idea to establish NII did not die with the death of the DI/TII figures, but continue from generation to generation. Leadership estafette aster the death of Kartosuwiryo move to Kahar Muzakar up to 1965, then be continued by Daud Beureuh up to 1989. The death of DI/TII figures has produced cleavage among the members. The cleavage was caused by the conflict among the Fillah group and Sabilillah group. At the time, the Fillah group was headed by Djadja Sujadi, and Sabilillah group was headed by Adah Djaelani Tirtapradja. Both are the member of Higher Commandement (AKT) TII that directly was inaugurated by Kartosuwiryo. Because of the cleavage, finally Djaja Sujadi was killed by Adah

Djaelani. During the leadership of Kartosuwiryo, DI/TII was divided into seven Regional Commandement, such as North Priangan, Central Java, East Java, Sulawesi, Kalimantan, Aceh, and South Priangan. The change of Regional Commandement widened by adding to Regional Commandement, that is Lampung and Jakarta Raya. The commandement of Jakarta Raya included Jakarta, Tangerang, and Banten. So the DI/TII consisted of nine regions. The arrest of Adah Djaelani in 1980, trigger the cleavage at the Sabilillah groups. Then, DI/TII was divided into smaller groups. The groups competed each others, and not recognize each other. One strong enough group in Central Java was Abdulah Sungkar group that established Islamic Boarding school at Ngruki, Sukoharjo Regency. The boarding schools are named as Al Mukmin. Various religious activities are done by Sungkar and Ba'asyir to widen the precept and influence of NII. JI is the main player in various terrorism events in Indonesia. For example the terrorism that has been done by JJI was Christmas bombing in 2000, Bali bombing in 2004, Kuningan bombing on July 2009. The JI do not only play in Indonesia, but it also in South East Asia. Because of its actions, PBB has categorized the organization as the terrorist in the UN Resolution No 1267. The resolution

contained the name of terrorist organization<sup>13</sup>.

## **b. Executive policy formulation of terrorism handling in Indonesia**

Since the glow of terror action and spread of terrorism in Indonesia, after destroyed various physical infrastructures and life of Indonesian societies, either middle up stratus or middle low status. Terrorism has degraded the humanity values, national rank, and religious norms. Terrors have shown real movement as tragedy on the human right. Destructive impact escalation that has been produced has touched life multi dimensions. The human identity, dignity as civilized nation and aspiration to live side by side with other nations in the noble mission "universal peace" and still defeated by the terror actions<sup>14</sup>. Because the familiarity of terror actions be used as one of human choices, finally terror shift by itself to be terrorism<sup>15</sup>. It means, terrorism take part in the national life to show the new dimension of crime<sup>16</sup>, transnational<sup>17</sup> crime that produced extraordinary impact<sup>18</sup>. Various terrors showed that;

First, terror can be occurred and emerged everywhere. Various terror actions that were done in Indonesia even in the big

cities, but the terror not in one region, but also occurred in the other countries such as Philippine, Thailand, Afganistan, Pakistan, Arab Saudi, Turkey, Britain, and United States. It showed that terrorism is global crime<sup>19</sup>. For Indonesia, the condition become a big phenomenon, why Indonesia become part of terrorism.

Second, from various terror action in Indonesia, it is revealed that the doers is Indonesian citizen that collaborate with foreign citizen. It showed that part of Indonesian citizen has been part of global organization<sup>20</sup>. The condition is the new phenomenon for Indonesia that so far known as friendly area and anti violent area, why easily part of Indonesian citizen become martyr and part of terrorism that prioritize the violent and uncouth ideology, or whether the root of terrorism has existed and developed in the Indonesian culture.

Third, in the last five years, the social phenomena that should be given attention, where the societal values of "gotong royong" has lost the "spirit" from the societal life of Indonesians, whereas the value is the social roots in building the social capital<sup>21</sup> in building social security.

Various above phenomenon showed how far the legal institution, institution and social institution ready to overcome the

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<sup>13</sup> Petrus Reinhard Golose, *Deradikalisasi Terorisme*, YPKIK, Jakarta, 2009, hlm. 25-33

<sup>14</sup> Security Development Agency of Indonesian Police Headquarters, *Op Cit*, page 5

<sup>15</sup> Ajie S, *Op-Cit* page 19

<sup>16</sup> Security Development Agency of Indonesian Police Headquarters, *Op Cit*, page 10

<sup>17</sup> Explanation about transnational crime at the explanation about transnational crime

<sup>18</sup> Explanation about transnational crime at the explanation about extraordinary crime

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<sup>19</sup> Andi Wijaya, *Menangkal terorisme Global, Kejahatan Terorisme Perspektif Agama, HAM dan Hukum*, (Jakarta: Refrika Aditama, 2004), hlm. 12.

<sup>20</sup> Murba abu, *Op cit*, page 747

<sup>21</sup> Social capital defined as the resources that can be viewed as investment to get new resources. As known that the resources is something that can be used to be consumed, stored and invested. The used resources in the investment called as capital.

global terrorism in Indonesia that seems will continue if not overcome comprehensively and integrally. For police, as the security apparatus, the law enforcer, protector, and the safe guarder and servant of the society, terrorism is extraordinary crime<sup>22</sup> that should be overcome by involving all national components. For the matter, it needs regulative measures to various policies and accelerate the government wills, as the strategy to overcome the terrorism in Indonesia that involving all national component. It is needed because in the domestic security system<sup>23</sup> that places the society as inseparable part from the security system.

The terrorism countermeasures in Indonesian have been determined in various policies and through various laws and regulation that are expected can be used as the means in anticipating the terrorism development. The determined policies in anticipating and counteracting the criminal actions or terrorism action, based on the facing problems so far in the security system implementation to anticipate and counteract the terrorism crime, then the determined policy is: "the built security system that able to anticipate and counteract the threat of terrorism action, either today or in the future, that will be implemented with the collective

spirit from all national components consequently and consistently"<sup>24</sup>

The terrorism countermeasure policies in Indonesia can be seen from, penal policies, that is overcoming by prioritizing the criminal law enforcement to the suspects. But the penal policies have many weaknesses that exist in the terrorism law, so it needs correction and perfection in overcoming the terrorism crime in the future. Such as correction and perfection that related with retroactive formulation that deviant from legality principles that have been accepted in general. The presence of retroactive will threaten the legal certainty. The no need for retroactive in the terrorism laws and regulation in the future does not mean detach the terror doers, but the doers still be trapped with other law and regulation (such as Criminal Code). So it does not violate the non retroactive principle/legality principle in the criminal code. While retroactive is needed for justice, then it needs depth investigation to the criminal actions that will be snared with terrorism act.<sup>25</sup>

Other problems that should be considered in regulating the terrorism eradication in the future is the penalization goals consistence. If the legislator consistent to the penalization that more oriented to relative theory or goal theory (utilitarian/doeltheorieen) that is penalize not

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<sup>22</sup> Peraturan Kapolri Nomor 9 Tahun 2007 tanggal 26 April, tentang Rencana Strategi Polri 2005-2009 (perubahan), Mabes Polri, lampiran halaman 3.

<sup>23</sup> Strategi dan Postur Pertahanan Keamanan Negara dalam Pembangunan Jangka Panjang Tahap II, Departemen Pertahanan Republik Indonesia.

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<sup>24</sup> Peraturan Presiden RI Nomor 18 tahun 2007, Tentang Rencana Kerja Pemerintah Tahun 2008, Bab 5 Pencegahan dan Penanggulangan Terorisme.

<sup>25</sup> Ali Masyhar, *Gaya Indonesia Menghadang Terorisme; Sebuah Kritik Atas Kebijakan Hukum Pidana Terhadap Tindak Pidana Terorisme di Indonesia*, (Bandung: Mandar Maju, 2009), hlm. 150-151.

to satisfy the absolute demand from the justice. Penal is taken away not because people have done crime (*quia peccatum est*) but to make people do not do the crime (*ne peccetur*)<sup>26</sup>. The death penalty threat to the terrorism doers need further discussion. Put the death penalty mistakenly of course will counter productive to the penalization that will be reached. The death penalization of course will break the hope to return in the society as good person. At least the terrorism doers still be given opportunities to redeem their mistakes and sins. If the death penalty is considered as needed, it needs further regulation about the execution procedure. The death penalty execution not should be done directly when the verdict is decided and /or when the clemency is rejected. The death penalty is more humanist if placed as conditional punishment.

The governmental policies that then will be used as foundation for all ministries and related institution to implement various steps and actions in efforts to overcome the terrorism in Indonesia. The governmental policies as explained above as the governmental support in overcoming terror in Indonesia, especially that is regulated in Governmental Instruction No 14 Year 2002. The implementation of the Presidential Instruction is the presence of agency that called as "Desk Anti Terror", in the Law and Security Coordination Ministry. The agency does not implement operation in fields but in

staff level that daily investigate and analyze and cooperate and coordinate in prevention and countermeasure to the terrorism. Because of its coordination nature, then the success and weaknesses of this agency can not be felt by society. So since the establishment of the agency and the prevail of the Presidential Instruction can not show yet the terrorism countermeasure efforts significantly, that done by the government. The agency that made by government for terrorism, as if only formality that unable to implement the government needs in the Presidential Instruction. For example the handling of various occurred terrorism, the agency should at the frontline in taking initiative and has role in taking decision, but the effort only just for investigation, formulation research, than finally will produce anticipation and countermeasure policies nationally and implemented by operational agencies such as Indonesian Police and State Intelligent Agency (BIN)

### **c. The Handling of terrorism criminal action by Indonesian Police**

The handling of terrorism criminal action by Indonesian police from examination to investigation has been done since the bombing at several area of Indonesian in 1980s when the Borobudur bombing occurred. The terrorism intensity can be seen clearly in 1999 when there was bombing of BEJ building, Philippines Embassy, and the famous explosion at Kuta Bali in 2002 that caused hundreds victims died and injured.

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<sup>26</sup> Muladi dan Barda Nawawi Arief, *Teori-teori dan Kebijakan Hukum Pidana*, (Bandung: Alumni, 1981), hlm 81.

From the event, Indonesian Police created special unit to reveal the terrorism. Indonesian Police cooperate with several nations in this case Australia, United States, Germany, Japan and other countries to hunt the terrorism doers by using information technology. Hard work done by the special unit revealed the terrorism network that involved Malaysian citizen. The revelation of the Bali bombing of 2002, did not decrease the terrorism network to do their action up to now. Various groups can be identified by the special unit. The special unit was the embryo of Special Detachment 88 of Anti Terror under Bareskrim. The special detachment take over the Bomb Special Unit that tackled since beginning, because the case handling of terrorism crime should be done continuously.

Special Detachment 88 of Anti Terror was established based on Indonesian Police Head Decision No. pol: Keputusan/30/VI/2003 on June 30 of 2003 about the change of Indonesian Police Head Decision No. Pol: Keputusan/53/X/2002 on October 17 2002 about Organization and Procedure of Headquarters Level Organization Unit of Indonesian Police, appendix "G" of Bareskrim of Indonesian Police. One year later, based on Indonesian Police Head decision No. Pol: Keputusan/22/VI/2204 on June 30 2004 about the change of Indonesian Police Head Decision No Pol: Keputusan/22/VI/2204 on June 30 2004 about the change of Indonesian Police Head Decision No. POL:

Keputusan/30/VI/2003 about Organization and Procedure of Headquarters Level Organization Unit of Indonesian Police, appendix "G" of Bareskrim of Indonesian Police, stated that Special Detachment 88 under Head of Bareskrim.

The success of terrorism criminal act revelation from 2000 to 2011 by Special Detachment 88 Anti error gets appreciation domestically or internationally. Even the abilities of special detachment can be equalized with the Anti Terror Detachment of Indonesian Army or other countries. Beside get many appreciation from various parties, many others also criticize the usage of coercive efforts that done by the Detachment at the arresting stage. The criticism especially the usage of firearm that is considered as excessive that caused many suspects died.

The coercive efforts done by the Special Detachment 88 at the arresting stage by using various firearms have strong reasons. The doers often fight against the detachment by using firearms even other danger substance that threat the officers and society around. The doers are trained and special skilled persons, from using firearms, bomb assembling and cold steel.

#### **d. The Indonesian Police Regulation that regulate the police operation**

The operational foundation in eradicating terrorism by police force should refer to the laws and regulations from the Indonesian Police Head.

The juridical foundation that is used by Indonesian Police in the terrorism eradication operative in Indonesia area is regulated in the Perkap No 3 Year 2009. The regulation contained: Chapter I Article 1 General Stipulation that contained definitions 1) Indonesian Police, 2) operational system of Indonesian Police, 3) police force operation 4) police force activities 5) secured situation 6) disaster 7) accident 8) security disturbance; article 2 contained about basis and principle in the Operational System of Indonesian Police that included a) legality b) duty c) prevention d) participation e) subsidiary f) give priority to prevention g) proactive h) flexible i) give priority to human right and not discriminative j) confidentiality k) integrative i) proportional, m) effective and efficient, n) transparent, o) accountability.

Article 3 contained the goals of the regulations as the main guidance for the implementer of Indonesian Police functions in conducting each operational activities to reach the goals. Article 4 contained about scope of the regulation that included a) Operational System of Indonesian Police , and b) Authorities and responsibility.

Chapter II of part one, article 4 about operational system of Indonesian police done to protect society and good and chattel to ensure a) free from physical and psychological disturbances, b) self safety, passion, courtesy, and other rights c) peace feeling and free from concerns and d) domestic security to embody national development. Article 6 contained operational

tasks of police force that are implemented through a) police force activities, and b) police force operation. Second regulate about police force activities in article 10, the police activities including a) examination, securing action, and mobilization , b) build society to improve participation, awareness and legal and law and regulation obedience, c) conduct regulation, protection, control, and patrol to societal activities and government activities as needed, d) implement all activities to ensure security, order, and traffic smoothness in street, e) maintain all activities in ensuring the security, order, and smoothness in street, f) conduct coordination, control, and technical building to the special police force, civil investigator and societal self security, g) conduct examination and investigation to all criminal action suitable with the criminal code and laws and regulation, h) conduct police fore identification, police medical unit, forensic laboratory, police psychology for police task interest, i) protect body, goods and chattel, societal and environmental securities from disturbance and disaster including giving help to uphold the human right, j) serve public interest before handled by authorized institution, k) give service to society suitable with their interest suitable with the police authority, i) conduct community policing, m) conduct other tasks suitable with laws and regulations.

To avoid the usage of excessive force that can not be answered for the Indonesian Police, then the police member should know

the goals of the force usage in police action, as regulated in Article 2 subsection (2) of Perkap No 1 Year 2009<sup>27</sup>: a) prevent, inhibit, or stop the criminal doers action that are trying to do action that oppose the law, b) prevent the criminal doers to escape or act that endanger the police members or society c) protect themselves and society from the criminal doers action that able to make injure or death, d) protect the courtesy. Article 14 contained Police Operations that are done by each unit at central/regional/functional or unit level that are formed and appointed to implement the police operation and able to cooperate with other police functions and governmental and non governmental institutions.

#### **e. Juridical implications of executive policy formulation in police action as discretion form**

1) Interpretation of ambiguous norms in the Perkap No 1 Year 2009 and Perkap No 8 Year 2009, about term of stop the suspects that done by police apparatus or investigator means direct shoot to the suspect. The shooting action to the suspect by apparatus is to stop the doers activities and can be interpreted as make death or kill so the suspect can not escape, fight against, or endanger the officers and society. The term of stop is very repressive and susceptible to the abuse by the apparatus in the field

practice. The Police apparatus are given discretion to assess condition according their perception and able to take actions directly to overcome the situation. The measuring rod of danger situation is also very bias and multi interpretation, and depend on the police individuals.

2) Implication to the suspects or victims and family because of discretion action with ambiguous norm assessment by the apparatus can be said that all died shot suspect without trial to prove fairly whether their action true or wrong. The transparent, fair, and balanced trial process can not be done because the suspect has died.

3) Implication of relax regulation and control in the police action as the discretion form at the arresting stage is very dangerous and can violate human right of the suspects because of the discretion. Without strict control and periodical evaluation to the law in the form of executive policy then the shooting by police will out of control and will occur abuse of power, that finally to society will become the victims of the fault shoot or died suspect without guilty statement by transparent, fair, and balanced trial.

## **2. Executive policy formulation of coercive efforts usage as discretion form of police in enforcing the law in several countries.**

Executive policy formulation of coercive effort usage as the police discretion

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<sup>27</sup> Perkap No 1 Year 2009 about the Usage of Force in the Police Action. Article 2 subsection (1) and (2)

form in the law enforcement in several countries can be used as comparator with regulation in the Indonesian Police. The comparative approach in the research aimed at comparing the executive police formulation of coercive efforts especially the firearms use or other police force in the task implementation in several countries. While the executive policy formulation is selected as comparator as follows: International Amnesty Standard of UN about the police coercive effort usage is important as the general reference internationally for police apparatus, standard operational procedure of coercive effort usage at United States Police, because the country that trains the member of special detachment 88 in arresting or handling the critical situation including helping equipment to reveal the terrorism network. The standard operational procedures of coercive efforts usage in the Philippine, because the situation in Philippine similar with situation in Indonesia, many terrorism doers in rebellion camp in South Philippine, the standard operational procedure of coercive efforts usage at Australian Police, because many cooperation between Indonesian Police and Australian Federal Police in handling terrorism, the standard operational procedure of coercive efforts usage in Singaporean Police (Police Force Act, 2004), the regulation regulate strictly the actions done by the police members.

The international regulation that regulate about the fire arm force, International Amnesty Standard of UN Year

2004, that explain about reason scope about the usage of excessive firearms by UN convention and regulation in some countries above actually refer to Police Head Officers Association Guidance (ACPO) that explained about the factors that should be concerned during selecting the firearms that suitable with the used tactic in the certain operation.

The firearm force usage regulation only regulated by one regulation in each country clearly, in detail, firmly and always be evaluated to minimize the hard injured victim too dead either the police or the society. The standard operational procedures of United States polices, the deadly force for death threat and physical injuries and serious physical injury, showed firearms to threat and attack, contact technique to attack that produce physical injuries, back down technique for light physical attack, commanding voice if reject to follow the request or persuasive efforts, verbal persuasion for light violation and professional presence for disorder in the public place.

Standard operational procedure of Philippine police force that regulate the deathly force, proper force, stopping the moving vehicles, after gun confrontation, investigation, arrest, finding, and attack, investigation stage, examination and emergency response. The regulation for firearms usage in some countries or international regulation tend to use paralyze the criminal doers, the terms often be interpreted by the officer to shoot the doers with target under waist or legs of the



suspects. The term of paralyze to bind the police officer in using firearms should not arbitrarily to the society or criminal doer can not be shot anytime suitable with police discretion. Officer should full of calculation and carefulness in using firearm to shoot, paralyze the doer to avoid serious injury or death. The use of firearms by officer should be regulated strictly and detail to avoid abuse of power and the firearms use should along with the respect to human rights.

Standard operational procedures of Australian Police includes: the use of force in arresting, arresting civil society and usage of firearms. The task of Singaporean Police in Police Force Act Year 2004 regulated; the administration of forces, function, steps, disciplines, police officer that will be armed, duty based on laws, police are not free from law, form and responsibility for action that done by police under command letter, police discretion task, discipline, prohibition, legal process for members that do violation, case reference to the public service commission, stipulation and witness security, discretion violation, evidence investigating committee and activities recording process done by police officer when doing arrest or legal action to society. The strict control done by internal police or government and society about the police action will direct to police action that respect to the human rights.

### **3. Executive Policy Formulation of Coercive Efforts Usage as Discretion**

#### **form of police force to the terrorism crime suspects in the future.**

##### **a. Executive policy formulation of police discretion in laws and regulations**

In the context of law enforcement, polices are demanded to have professional integrity as the requirement for police force task implementation. Because without professional integrity, the attitude and actions done just based on subjective personal interest perception and motivation that possibly to violate and abuse or violate ethic code and morality standard of police as prevails universally.

According to Mardjono Reksodiputro, in the paper with title "Police Science and Indonesian Police Professionalism" in order to commemorate eight years of Police Science of Indonesian University (KIK-UI), stated as follow: Police professionalism refer to the presence of some expertise and special knowledge as the performer characteristic, goal and quality (conduct, aims and qualities) of police work<sup>28</sup>. As professional, as member of Indonesian Police, a police member has autonomy, neutral and independent. Related with the organizational position of police in the executive field, Indonesian Police in conducting the task without intervention from politicians suitable with main task professionally suitable with Article 13 Law No 2 Year 2002 about Indonesian Republic Police stated as follow: the main task of Indonesian Republic Police as follows a) maintain

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<sup>28</sup> Mardjono Reksodiputro, *Ilmu Kepolisian dan Profesionalisme Polri*, Makalah yang disampaikan dalam rangka Sewindu Kajian Ilmu Kepolisian Universitas Indonesia Jakarta.

security and order of society b) law enforcement, and c) give protection, safeguard, and services to society<sup>29</sup>.

Professionalism in conducting task and according their own assessment is a professional discretion that done in job. The discretion is present and tied on each police member in doing their task. But each police member should has high integrity and moral, and should be maintained regularly, the tied authorities and discretion in the usage should consider the limiting signs. The usage of discretion excessively should be controlled through supervision mechanism internally through ethic cod and professional discipline. Externally the supervision mechanism should be answered legally and prevail to all citizen including police (legal accountability)

Action that called as discretion is considered by some parties as produced arrogance and arbitrary actions from the police that will degrade the societal trust and police image. Because of that, it needs state institution to control and asses, how far the task and authorities that given to police have been done and can be accounted for morally and legally. Beside that, it also need societal roles in giving input, suggestion and criticism to build police performance. So the societal expectation will be realized, and police able

to show their performance as the societal servants, protector, safe guarder and law enforcer that are expected by society. The police discretion done for public interest, according their own assessment is done not for their will but as institutional action that given by constitution. Of course the action according to their own assessment should not violate legal norms, ethic, moral and properness in societal and national life. The discretionary actions that have been done should can be accounted for accountably and professionally. As member of Indonesian Police should has serving spirit to society, without serving spirit, then the polices won't ever their task, but only will degrade the police image.

## **b. The arrest regulation to the suspect in the laws**

Definition of arrest is investigator actions in the form of temporary restraint for the suspect or the accused freedom if there are enough evidences for investigation interest or prosecution or trial according to the laws<sup>30</sup>. We know that our judicature system refer to the Law No 8 Year 1981 about Criminal Procedure Code (KUHP), arrest has been regulated at the Article 1 sub section 20. While the arrest command done to someone that is presumed strongly conduct criminal action based on enough initial evidences. The arrest in this case means that arrest can not be done for

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<sup>29</sup> Look at tasks and authorities that given by law that is too hard, one side to maintain the security and order, at other side as protector and safeguard and as law enforcer. Of course the task and authorities relate with society, especially societies that break the law will judge that the police facing problems like or dislike and considers the police as arrogant in action, while in the victim view, the police action has been true and fair. One phenomenon of task and authorities that are unique in this country

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<sup>30</sup> Look Pasal 1 Butir 20 Undang-Undang Nomor 8 Tahun 1981 Tentang Kitab Undang-Undang Hukum Acara Pidana (KUHP) masterpiece in protecting human right

everyone, especially the person clearly done the criminal action. If the arrest is done not based on enough initial evidence, then the power abuse has been occurred and violate the human rights.

The arrest procedure to certain person that is presumed has done criminal action refer to Law No 8 Year 1981 about KUHAP of State Sheet Year 1981 No 3209 that is prevailed on December 31 Year 1981 with the prevail of the KUHAP caused the change of fundamental function in the criminal judicature system, with the change the investigation system also changed. The fundamental change also experienced cultural change for law enforcer in field, so it needs effort in improving abilities, skill and expertise for all law enforcers and done continuously. Before issuance of the KUHP in the law enforcement process, the handing procedure still used HIR, the treatment to suspect in finding the evidence by violence, even torturing that cause criminalization<sup>31</sup>. It is done to pursue the confession only, not based on scientific proofing that can be accounted for the truth. The action able to cause physical disability and mental disability to the criminal doer, the action cause is abuse of power and violate human rights.

Then the arrest regulation can be seen in the Article 18 of Law No 8 Year 1981

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<sup>31</sup> Lihat Dalam Yahman, Makalah yang disampaikan dalam, *Pelatihan Pembuktian Terkait Saksi Dalam Proses Peradilan*, Kerjasama Fakultas Hukum Universitas Airlangga dan Bank Jatim, Angkatan II Surabaya, Tanggal 10 S/d 12 Desember 2010, Term from the conflict of "lizard and crocodile" in the case of Bibit Chandra and Susno Duadji that become public attention, politician, law experts and become the debat in the printed and electronic media.

about KUHAP Article 18 subsection (1) the arrest tasks implementation that are done by police officer by showing the task letter and give to the suspect the arrest letter that showed the suspect identity and give the reason of the arrest and brief explanation about the crime is suspected to the person and the place for investigation. Article (2) in the case of catch in act, the arrest done without arrest letter, with stipulation that the arrester should bring the suspect and the evidences to the investigator or assistant investigator. Article (3) the copy of the letter given to the suspect family after arrest.

The arrest regulation beside is regulated in KUHAP, also regulated in Article 26, 28, Law No 15 Year 2003 about Terrorism Criminal Action Eradication, that give authorities to the investigator to arrest the terrorism doers based on enough initial evidences. The definition of enough initial evidences in the terrorism criminal action suitable with the Article 26 of Law no 15 Year 2003, with the "intelligent report", report that relates with the national security problems. The intelligent reports are obtained from Internal Affair Department.<sup>32</sup> The stipulation in this article is the special regulation that prevails to the terrorism doers.

### **c. Executive Policy Formulation of Police Discretion at the arresting**

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<sup>32</sup> Lihat Penjelasan Pasl 26 Undang-Undang Nomor 15 Tahun 2003 tentang Pemberantasan Tindak Pidana Terorisme, bukti yang cukup adalah laporan Intelijen yang menyangkut keamanan negara, hal ini berbeda dengan bukti yang cukup yang diatur dalam ketentuan KUHAP.

## **stage of terrorism criminal action doers.**

In the article 16 KUHAP, it is determined that for the investigation interest, the investigator has authorities to arrest. The arrest is done to certain person that presumed has done criminal action, especially terrorism. The arrest procedure to the terrorism criminal action refer to the stipulations that are regulated in the Law No 8 Year 1981 about KUHAP beside refer to Law No 15 Year 2003 about terrorism eradication. The terrorism criminal action that is regulated in the Law No 15 Year 2003 about Governmental Regulation Stipulation of Law Substitute No 1 Year 2002 about Terrorism Criminal Action Eradication become law.

Article 6 Law No 15 Year 2003 about terrorism stated that,

Every person that intentionally uses violence or violence threat that produces terror situation or fright feeling to someone widen or produced mass victims by seizing freedom or the lost of life or goods and chattel of other person or caused damage or destroy to vital strategic object or life environment or public facilities or international facilities, is penalized with dead punishment or jail life long or at least 4 years jails or the longest 20 years.

The arrest to terrorism criminal action doers is different with the conventional criminal doers, because in the terrorism criminal action is extraordinary crime, the consequences are extraordinary, even causes human victim, hard injuries or bad damage. The arrest regulation is different with the

terrorism criminal action, an investigator to get enough time to get accurate information, the investigator has authorities to arrest maximally 24 hours and if it is lack, then the investigator able to lengthen up to 48 hours and should get permission from district court head. The stipulation also implemented in the Terrorism Law in Canada, where the arrest can be lengthened to 72 hours<sup>33</sup>.

Different with arrest stipulation to suspect as regulated in the KUHAP, investigator is given 24 hours and can not be lengthened, the time can't be lengthened, at the time period a suspect should get certainty, is he will be detained or not, if not then the suspect will be returned home by making Return Official Report, the action as explained in the Article 75 KUHAP, that stated all investigators action should be written in the official report. The arrest time period consideration in the terrorism crime, because the doers have strong and closed networks. Because of that to get more complete and accurate information, it needs longer time. For effectiveness and efficiency, the arrest should done by Indonesian Police. So the investigator bring command letter to the assistant investigator to arrest. But suspect that has been arrested by the assistant investigator should be given soon to the investigator for investigation.<sup>34</sup>

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<sup>33</sup> Adnan Buyung Nasution, *Proses Acara Pidana dalam Kejahatan Terorisme*, Disampaikan dalam Seminar Nasional Hakekat dan Kebijakan Kriminal Kejahatan Terorisme, pada tanggal, 21-22 Mei, Fakultas Hukum Ubaya, Surabaya, 2003, hlm. 10.

<sup>34</sup> Koesno Adi, *Kajian Perubahan Regulasi Penanggulangan Kejahatan Terorisme*, Makalah disampaikan dalam Work Shop 2 pada tanggal 28-30

The arrest in the terrorism crime give emphasis to the arrest ways that consider the properness norms and the suspect rights. It is important, because so far the arrest by police lack in giving attention to the suspect rights and tend to show arrogance. Article that regulates the arrest is Article 28 of Law No 15 Year 2003 about the Terrorism Crime Eradication stated, that:

"Investigator able to arrest each person that is suspected as did terrorism crime based on initial evidence as given in article 26 subsection (2) maximum 7x24 hours"

Related with enough initial evidence based on the intelligent report, according Yusril Ihza Mahendra, stated that not all intelligent report can be proposed to the court as the initial evidence for terrorism crime, only factual intelligence report and reported institutionally hat can be examined by chairman or deputy chairman of district court<sup>35</sup>. The intelligent report that is given to the district court chairman should be verified or checked as the control measure, so the done steps by the investigators as arrest foundation can be answered legally, based on norms and properness in the society.

Intelligent report can be proposed to the district court chairman as the initial evidence by national intelligence institution, so the intelligent report here is factual report, not analysis report. Also not each intelligent able to propose report to the district court

chairman. The intelligent report that is proposed to district court to be initial evidence should be institutional report, such as intelligent report from national intelligent agency (BIN) or Immigration General Directorate<sup>36</sup>. The foreign intelligent report can not be used as initial evidence at the district court, but if the report has been accepted and used as intelligent institutional report domestically, can be proposed to the district court as the initial evidence for terrorism investigation. For example, intelligent report and Interpol, after be received by Indonesian Republic Police Headquarter then proposed as the Indonesian police intelligent report, the most important is the report is factual<sup>37</sup>.

In understanding the Article 26 Law No 15 Year 2003 about the Terrorism Eradication that regulate to get initial evidence, the investigator can use intelligent report from Police, Attorney, Immigration General Directorate, Indonesian National Army, or National Intelligent Agency, Custom General Directorate. To be used as initial evidence in relation for to take action, it should be determined first by District Court Chairman firstly. The regulation is needed as control in the suspect arrest of terrorism suspect.

Related with the enough initial evidence the investigator is given authorities as regulated in the Article 31 of Law No 15 Year 2003 about terrorism criminal action, stated that:

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Januari, pada Pusat Pengembangan Otoda Fakultas Hukum Universitas Brawijaya, Malang, 2003, hlm. 10.

<sup>35</sup> Lihat Abdul Wahid, at. Al, *Kejahatan Terorisme Perspektif Agama, Ham dan Hukum*, (Bandung: Refika Aditama, 2004), hlm. 110.

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<sup>36</sup> Ibid

<sup>37</sup> Ibid

Subsection (1) based on enough initial evidence as mentioned in the article 26 subsection (4), the investigators have rights:

- a. open, examine, and seize letters and consignment through post or other courier that related with the case of terrorism under examination
- b. tap conversation through phone or other communication that is expected be used to prepare, to plan, and to do terrorism action.

Subsection (2) the tapping action as mentioned in the subsection (1) letter b only can be done under command of district court chairman for maximum 1 year. Subsection (3) the action as mentioned in the subsection (1) and subsection (2) should be reported or answered to the investigator superior.

Related with the terrorism suspect based on stipulation Article 54 and article 114 KUHAP, before investigators conduct examination to the suspect, then the suspect should be given information about his or her rights including to get legal aid with accompanying of legal advisor in the examination. Then article 115 KUHAP stated, the legal advisor in accompanying the suspect is done by looking or observing and listening the examination by the investigator, but in case the crime to national security, the legal advisor able to look but not to listen the examination. The stipulation of article 114 KUHAP, it is regulated that the investigator is obliged before examination to give information that the suspect has right to get legal aid from legal advisor /advocates, and

give information that his case demand him to be examined with his advocate. Suitable with Miranda Rule principles, then the notification should be given after the person is stated as the suspect, to give him or her time to contact advocate for consultation. But the fact so far not like this, someone is made as suspect not give notification about his legal right. The notification is given when the examination is done. It makes the suspect does not have time and opportunity to contact and consult with advocate about his problems and the notification only formality in nature.

Miranda Rule is the universal rules where almost all countries that based on the law has similar law regulations. Indonesia is legal nation that respect to Miranda Rule that is evidenced by adopting the Miranda Rule in the Criminal Procedure Legal System that is in Article 56 subsection (1) Law No 8 Years 1981 KUHAP that stated: in case the suspect or the accused is suspected or accused doing criminal action that is threaten with death punishment or 15 years punishment or more for them who unable to get their own advocate, the officials in all level examination in the trial process should appoint advocate for them. It should be given attention also privileges right that owned by the suspect is the protection from stigmatization of guilty with "presumption of innocent", means everyone that is suspected, arrested, detained, prosecuted, or trialed should be consider as innocent before there

is court decision that state his mistake with permanent legal power.

Based on the principles, give understanding, that the suspect has "obligatory" position as legal subject not legal object, it means he involves in the system that make clear his existence. He is not the criminal doer yet, but just categorized as initial figure that can be used as reference for crime, so should not be sacrificed in the guilty presumption. In the case of suspect rights that given by investigators, if the suspect reject to be accompanied by advocate, then for transparency in the legal enforcement, then the investigator should make official report of rejection from the suspect, that the content is rejection to be accompanied by advocate in his case, the rejection letter from the suspect should be known and signed by related advocate<sup>38</sup>.

Violation to the suspect rights has been regulated in the positive law in Indonesia. To avoid the violation, deviation and abuse, related with investigation, examination, prosecution and trial should be controlled by objective work quality, serve to ensure apparatus professionalism and control the apparatus performance based on the work standard that has been given. The reward and punishment system, serve as the stimulus to make apparatus productive in work<sup>39</sup>. So the expectation in the arrest to the terrorism crime doer can be implemented by considering the norms in society, to avoid

the authority abuse it needs control as check and balance.

Law enforcement fully is the unrealistic expectation, because there are obstacles in implementation, that is limited time, personnel, or infrastructure so require discretion. So the remain is actual enforcement, it is total enforcement that is deducted by discretion. In the practice, law enforcement related with the terrorism crime doers arrest still need policy in taking discretion.

The discretion action that is determined by investigator in field directly in the arrest of terrorism doers at that time without approval or guidance from superiors is individual discretion. For example, the arrest action that done when the officer know the terrorism crime doer is doing bomb installation in certain place, it is done to avoid the event that cause victims. While the action to detain or not to the doer or stop the investigation process, the action is not individual discretion of police member. The action is the bureaucracy discretion in the discretionary decision making based on guidance and policies of leader in the institution that become standard operational procedure in decision making.

#### **d. Executive policy formulation of coercive effort usage as fixed procedure of force usage in the police action.**

Police has Perkap No1 Year 2008 about Procedure to Use Force in the Police Action. The Perkap regulates about the usage

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<sup>38</sup> Ibid, hlm. 40

<sup>39</sup> Jacky Uly dan Bernard L. Tanya, *Money Laundering*, (Surabaya: Laros, 2009), hlm. 82

of force in the police action from the light scale or by using hand, stick, electric weapon up to firearms. The regulation of force usage is general in nature, it means usually be used at any situation and interpreted freely by police apparatus.

The usage of force in the police action of the usage of violence can be justified if the law enforced facing difficult condition or in emergency situation that endanger public or his or her own interest. The MU-UN resolution No: 169, December 17 of 1979 about Code of Conduct for Law Enforcement Officials permit the law enforcer to use force as the exceptional in conducting their tasks<sup>40</sup>. Completely, article 3 , Code of Conduct for Law Enforcement Official stated: "Law Enforcement Official May use force only when strictly necessary and to the extent required for the performance of their duty" The article 33 give notes, as follows:

- a. The usage of force should be exceptional.  
The law enforcer can be given authorities to use the force so far to prevent crime or in effort to arrest legally to the criminal doers.
- b. National law usually limit the usage of force by law enforcer suitable with the proportionality principle. The proportionality principle that is regulated in the national law should suitable with the principle in this regulation
- c. The use of firearms is considered as extreme action. Each effort should be

done to avoid the firearms usage, especially for children. In general, firearms can not be used except the suspect fight against by gun or endanger other person life, while the other action is considered as not enough to arrest the suspect. Each firearm usage should be accompanied with the report to authorized parties.

The usage of force should be regulated completely and comprehensively so ensure the balance between authority and responsibility. The balance as regulated in the basic principle on the use of force and firearm by law enforcement officials that is accepted by UN Congress<sup>8<sup>th</sup></sup> /1990 in Havana Cuba about the prevention of crime and treatment of offenders. In the principle, it is said that government able to implement force regulation and firearm by legal enforcement officials. In the next regulation also be said that government should ensure the usage of force and firearm arbitrarily or abuse are penalized according to the law.

Furthermore, basic principle of the use of force and firearm by law enforcement officials give signs about the force and firearm usage in the form of general provision and special provision. The general provision including:

- a. Government and law enforcement officials should adopt and implement the basic principle. In developing the regulation in the national law, government and the law enforcement officials should consider ethics in using force and firearm. The

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<sup>40</sup> Ari Wibowo, *Hukum Pidana Terorisme : Kebijakan formulasi Hukum Pidana dalam Penanggulangan Tindak Pidana Terorisme*, (Yogyakarta: Graha Ilmu, 2012), hlm. 162-163.



regulation should be reviewed continuously.

- b. Examination and law enforcement official should develop various device as wide as possible and equipped the law enforcement official with various guns and munitions that can be used in certain conditions, including the gun development that able to paralyze but not deadly to suppress the usage of deadly weapon, the law enforcement officials should be equipped with the self defense equipment such as shield, help, bullet proof vest and bullet proof vehicles, in effort to decrease the firearm usage.
- c. The development and deployment of non deadly weapon should be evaluated carefully to minimize danger risk for non involved persons, the use of the weapon should be controlled carefully.
- d. The law enforcement officials, in conducting their task should as possible using non forcing ways before shift to use forcing ways and firearm if other ways are not effective and considered as unable to reach the goal.
- e. If the usage of force action and firearm can not be avoided, then the law enforcement apparatus should be:
  - 1. Take reins in using the force way and act proportionally suitable with the violation and the reached goals.
  - 2. Minimize the damage and injuries, and respect the human life

3. Ensure that serving and medial aid have been given to each injured person or impacted as soon as possible

4. Ensure that families or the closest person from the victim notify soon.

- f. If there are injuries or death caused by the force action and firearms by law enforcement apparatus, then the law enforcement apparatus should report soon to their superior.
- g. Government should ensure that the arbitrary action or abuse of force action and firearm by law enforcement apparatus will be punished based on national law.
- h. Extraordinary condition such as internal politic instability or public emergency condition can net be used to justify the deviation from the principles.

While at the special provision, it is stated that regulation about the use of firearms by law enforcement apparatus including guideline as follows:

- a. Determine the certain condition specification that give authorities to the law enforcement apparatus to bring firearm and munitions, and determine the weapon type.
- b. Ensure that the used firearm only at certain condition and with way that tend to degrade risk that should not be occurred.
- c. Prohibit the firearm usage and munitions that caused injuries or risk are not reasoned
- d. Regulate the control, deviation, and the usage of firearm including procedures to

ensure that the law enforcement apparatus responsible for the firearm and the munitions.

- e. Give warning if the firearms will be used.
- f. Providing report system each law enforcement apparatus uses the firearm in the task implementation.

Related with the force action and firearm, basic principle of the use of force and firearm by law enforcement officials should determine the reporting procedure and the assessment, that is

- a. Government and the law enforcement officials should determine the effective report and assessment procedure for the use of force and firearm. To support the procedures, it should be also the authorized party to the administration and prosecution to asses independently. In case of death and serious injury or hard consequences, detail report should be sent soon to authorized officials to give assessment administratively or judicial control.
- b. Persons that are impacted by the force and firearm use, or their legal sovereignty should be given access to propose their problems to independent process, including independent trial. When the person died, the provision is prevail for the family.
- c. Government and law enforcement officials should ensure that the superior responsible for their superiors that use the force and firearm illegally if the superior

knows, or should knows but does not take action to prevent, suppress, or report it.

- d. Government and law enforcement officials should ensure that there is criminal sanction or discipline sanction that is imposed to the law enforcement apparatus that have work suitable with the code of conduct for law enforcement officials and basic principle on the use of force and firearms by law enforcement officials, or report the use of force and firearm, or report the use of force and firearm by other apparatus.
- e. The subservience to the superior command can not be used as justification if the law enforcement officials know that the order to use force and firearm able to cause death or serious injuries to certain person and violate the law, while he has opportunities to reject the command. In the any case, the responsible also at the superior that give order to the action that violate the law.

Above explanation showed that code of conduct for the law enforcement officials has give comprehensive guideline about the force and firearms use by the apparatus. Because of that, to make the terrorism criminal action eradication does not violate the human right, then both international guideline can be adopted in the fixed procedures of terrorism crime. By having the clear and measured fixed procedures, then the action of law enforcement official, especially Special Detachment 88 Anti terror in handling the terrorism criminal action can

be answered for. By adopting both international guidance is expected the shot of Nur Imam in the terrorism operation at Sukoharjo will not be repeated again.<sup>41</sup>

**e. Executive Policy Formulation as Standard Operational Procedure of Coercive Effort Usage in the form of Discretion in the future.**

In formation of laws and regulation should be based on the good laws and regulations formation such as a) clear goals, b) appropriate former body or organ, c) suitability between type and content materials, and d) can be executed, e) effective and efficient f) clear formulation and g) openness

The more explicit in the Law No 10 Year 2004 about the Laws And Regulation Formations (State Sheets of 2004 Number 53, The State Sheet Addition No 4389). At the article 6 of subsection (1) is formulated as follows:

(1) content materials of laws and regulations contain principle: a. safeguard, b. humanity, c, nationality, d, kinship, e, archipelago, f. unity in diversity, g, justice, h, equality before the law, I, order and certainty, j, balance, harmony, congeniality

(2) Beside principle as mentioned at the subsection (1), the laws and regulation can be filled with other principle suitable with related the laws and regulation.

Standard operational procedure as the formulation policy of internal police in case to use force as discretion in the future should fulfill elements and principle of legal state, that include 6 (six) things as follows:

1. Confession, respect, and protection to human right that rooted to respect to the human dignity
2. The prevail of law certainty. The legal state aimed to ensure the legal certainty can be embodied in the society. The law aimed at ensuring the certainty and high predictability, so the life dynamic in the society is predictable. The principles that are contained or related with the legal certainty are:
  - a. Legality, constitutionality, and law supremacy principles
  - b. Principle that law determine various regulation about thaw way to command and the officials in conducting the government
  - c. Non retroactive principle of law, before binding, the law should be issued and announced well.
  - d. Free judicature principle, independent, impartial, objective, rational, fair, and humane
  - e. Non liquet principle, judge should not reject case with reason of no laws or no clear laws

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<sup>41</sup> Nur Imam is the Angkringan trader that is shot deadly when Special Detachment 88 fought with suspect of Cirebon Bomb Terrorist, that is Sigit Qurdowi and Hendro Yuniarto at Sukoharjo On May 17 2011. Indonesian Police headquarter confessed that the death of Nur Imam caused by bullet that come from the suspect. Look at <http://nasional.inilah.com/read/detail/1513032> Kapolri didesak ungkap protap penyergapan teroris, "Tewasnya Pedagang Angkringan; Kapolri Didesak Ungkap Protap Penyergapan terorisme", Diakses pada tanggal 11 Agustus 2011.

- f. Human rights should be formulated and ensured the protection in the constitution
3. The prevail of equality before the law  
In the legal state, government should not give privilege to certain person or groups, or discriminate person or certain group. In this principle, contain (a) the presence of equality for all person before the law and government, and (b) the presence of mechanism to demand equal treatment for all citizen
4. Balance principle, each law enforcement official should based on balance principle that is match between protection to human dignity and the societal orders. Balance principle means that the suspect position is not examination object. They should has balanced position to the law enforcement apparatus. With the balanced position, will impact the suspect able to defense himself maximally. The law enforcement apparatus will not act arbitrarily.
5. Democracy principle where each person has equal right and opportunities in the government or to influence governmental actions. For that matter, democracy should be embodied through some principles, that is:
  - a. The presence of selection mechanism for certain public officials that is direct, common, free, confidential, fair and just that implemented periodically
  - b. Government responsible and can be ask their responsibility by legislative assembly
  - c. All citizen has equal opportunities and possibilities to participate in political decision making and control government,
  - d. All governmental actions are open to criticism and rational investigation by all parties
  - e. Free to speak / to belief and state opinion
  - f. Press and information traffic freedom
  - g. Bill should be published to facilitate people participation effectively.
6. Government and officials have mandate as the societal servants in efforts to realize the societal welfare suitable with the state goals. In this principle contain the things below:
  - a. General principles of proper government
  - b. Fundamental requirement for the presence of human in the laws and regulation are guaranteed and formulated in the laws and regulations, especially in the constitution
  - c. Government should rationally manage all its actions, has clear goal and efficient. It means, government should be implemented effectively and efficiently.

Such are the principles of good legal system and also fulfill criteria of laws and regulation that generally determine the basis:

- a. principles

- b. rights and obligation
- c. procedures

Related with the matters in loading the content of laws and regulation into standard operational procedures based on Perkap No 26 Year 2010 about Procedures To Establish Police Regulation, the three things should be considered, so the rights and duties of polices or civil servant in the Indonesian Police as the emphasis that is supported by principle and procedures, with expectation, that the Perkap about the use of force in the police action in the future should be amended to perfection or at least near perfection, especially the three criteria that determine the laws and regulation formation, that is principles, rights and obligations, and procedures.

So, in the future the use of force in the police action as the discretion of police at the arresting stage of terrorism crime will suitable with the spirit of Indonesian Republic Law No 2 Year 2002 about Indonesian Republic Police, especially article 18 about police discretion, stated:

Subsection (1) For public interest, the police official of Indonesian republic in conducting their task and authorities able to act according their own assessment.

Subsection (2) the stipulation implementation as mentioned in the subsection (1) only can be done in the very necessary condition by considering the law and regulation, and ethic cod of profession.

Beside that, the use of force according to article 15 subsection (1) letter f,

stated that the police action is coercive effort and/or other action that is responsible legally to realize the orders and societal piece.

Beside that, standard operational procedures of force use in the police action beside as the police discretion in the future during the arrest of terrorism crime suspect able to harmony with the opinion of international discretion expert, stated that "discretion is power authority conferred by law to act on the basic justicement or cocience and it use is more in idea of morals than law<sup>42</sup>".

#### **f. Control of coercive effort use as the police discretion at the arrest stage of terrorism action.**

Control is action that done to control the conducted activities, to reach desired thing and no deviation or mistake and produce maximum product suitable with the plan. The supervision term is translation of control<sup>43</sup>. According to Henry Fayol, control is a research whether everything was done suitable with plan or not and the implemented principle.<sup>44</sup> According to Muchsan, control is activity to asses task implementation de facto, while the control goals limited to the matching whether the conducted activities suitable with the determined measuring rod.<sup>45</sup>

<sup>42</sup> Thomas J Aaron , Op-cit hlm. 8.

<sup>43</sup> Irfan Fachrudin, *Pengawasan Peradilan Adminitrsai Terhadap Tindakan Pemerintah*, (Bandung: Alumni, 2004), hlm. 88.

<sup>44</sup> Ibid. hlm. 89

<sup>45</sup> Muchsan, *Stara Pengawasan Terhadap Perbuatan Aparat Pemerintah dan Peradilan Tata Usaha Negara Indonesia*, (Yogyakarta: Liberty, 1992), hlm. 38.

Control term from several opinions can be defined as, control means action to see the done activities so the activities in the proper mechanism and accountable in law norm corridor, social and properness norm, so the done activities can run effective suitable with the plan and no deviation.

Control if connected with the police control means, activities or actions that were done, the in implementing the task and authorities given to police that stay at the correct track, the authorities limit in the implementation can be accounted for suitable with the existing norms and suitable with the prevailing laws and regulations and the given responsibilities and authorities suitable with law.

The control is done in the context law enforcement no deviation and abuse of power, because the police has great discretion, if no control there will be abuse of power and arbitrary actions. The given discretions, especially in arresting prioritize the power than authority, then cause the violation of the suspect rights. For example at the case of Sengkon and Karta, the Kemat and Sugik case at the Jombang District Court was the evidence of no professional control, justice only rhetoric and far from expectation.

We know that in the criminal judicature, we know criminal justice system (CJS). Police is part of the system, as the investigator, attorney as the prosecutor, and judge as the determinant are demanded to do their jobs fairly and with legal certainty. In the practice the police unable to realize

the legal justice and legal certainty, for example the Kemat and Sugik case in Jombang, the investigator actions based on confession do not based on scientific proving that is accountable for its truth, here showed that control can not run maximally, so violate the suspect right even violate the human rights.

## **CONCLUSIONS**

Based on the discussion at previous chapters that investigated and analyzed about executive policy formulation of coercive efforts as the form of police discretion concluded as follows:

1. Executive policy formulation of coercive efforts use as the form of police discretion at the arrest stage of terrorism crime suspect can be seen from the laws and regulation and internal regulation of police that are used as the legal foundation for police investigators as follows;
  - a. regulated in the article 7 subsection 1 KUHP, give authorities to investigators because of their obligation able to do other action according to responsible laws or called as discretionary authorities
  - b. regulated in the Perkap No 1 Year 2009 about the use of force in the police action and Perkap No 8 year 2009 about Implementation of Principle and Standard of Human Right in the Police Task Implementation. Both regulations regulate about the use of force and firearms that produce multi

interpretation such as; for term of stop at article 1 number 5, article 5 subsection (1) letter f, article 7 subsection (1), article 8 subsection (2) and (3) means that the use of force can be done if necessary and can not be avoided based on facing situation to stop the suspect actions. The term of stop is also contained at Perkap No 8 Year 2009 about Implementation of Principle and Standard of Human Rights in the Task Implementation of Police, especially at the Article 47 subsection (2) letter e. The term of stop is very repressive and possible for abuse.

c. Based on international instruments as follows:

International Amnesty Standard of UN about the use of force regulate about important principles of human right about the use of force and firearms in general are a) proportionality: the force use should be proportional with the legal goals that will be reached, and the weight of the violation, b) accountability: to ensure accountability the use of force and firearms, should be use reporting procedure and reviews c) needs: the use of force should be extraordinary action. No provision in the international law about "shoot to kill". The use of "paralyze" term in regulation about firearms is emphasized to be obeyed by police apparatus to avoid maximally the serious injuries and death.

d. standard stipulation about the use of force at police in several countries: in United States, Australian Federal Police and Singaporean Police, there are some important thing that should be accounted as the foundation for police apparatus in using force at the police action such as 1) the use of force in police in the countries included in the police laws and regulations, 2) the use of force in police especially firearms is regulated strictly by give emphasis to the human right protection 3) the use of firearm is the last effort after other effort not success 4) control strictly to each firearms use done by police apparatus to the communities and they should responsible if violate

2. The used consideration in use of coercive efforts as discretion forms at the arresting stage of terrorism crime suspect by investigator based on their own assessment;

a. Generally, the authorities known as police discretion, whose validity based on the consideration about the need for the task. Substance of article 18 subsection (1) Law of Police No 2 Year 2002, take appropriate and professional action based on their own assessment in implementing their task should suitable and consider the laws and regulation and ethical code of police profession of Indonesian republic.

b. Principle in the police discretion authorities as follows a) need principle,

- b) problem principle as the reference c) goal principle as the measure d) balance principle.
- 3. Executive policy formulation of coercive effort as form of police discretion at the arresting stage of the terrorism crime suspect in the future;
  - a. should fulfill three interrelated subsystems in the enforcement. The subsystems are legal substance, legal structure, legal culture
  - b. three concept in the law enforcement that should be considered in executive policy formulation drafting as SOP of the police force use, especially in the firearms use at the arresting stage as the discretion forms. In practice, in law enforcement related with the suspect arrest still needs policy in taking action in the form of "discretion"
  - c. The use of force in the police action in explaining article 15 subsection (1) letter f Law No 2 Year 2002, that confirmed the policy action is coercive action and/or other action that responsible to uphold the law and embodiment of societal peace are not explained in detail and form in the Policy Formulation as the Standard Operational Procedure of the force use as police discretion today. Regulation should be oriented to people interest or safe societies from the dehumanism practice, violation of human rights and renew the perspective and life style

that support and respect to human right

- d. Control to the use of force in the police action by police apparatus by internal supervisor and external supervisor. Internal police that has supervising role is Itwasum at Headquarter and Itwasda at local level and Propam Division that investigate the violation of force use in the police action as discretion form, but in the reality the abuse of power in the firearm use by police officers still occurs. The external controls is done by Kompolnas, Legislative Assembly, NGO, and Human Right Commission and other societal components that considered as not optimal to reduce the power abuse of police officer in the firearm use.

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